IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.88 OF 1992

Shri Uddhav Sadashiv Kawale .. Appellant
(Orig. Plaintiff No.1)

Versus

1. Smt. Rahibai w/o. Rampratap Ladha
   (SA is abated against R.No.1
   as per Addl. Registrar's order
   dated 24/09/93)
2. Somnath Shivnarayan Ladha
3. Hiralal Rampratap Ladha
4. Raghuvir Sadashiv Kawale
   since deceased by his legal heirs
   4-a. Ramakant Raghuvir Kawale
5. Vishnu Sadashiv Kawale
6. Dattatraya Sadashiv Kawale
   (SA is abated against R.No.5
   and 6 as per Addl. Registrar's
   order dated 24/09/93) .. Respondents
   (Nos.1 to 5 Original
   Defendants 1 to 5 & No.6
   Original Plaintiff No.2)

Mr. V.S. Gokhale for Mr. B.P. Apte for Appellant
Mr. Haridas i/b. Mr. P.N. Joshi Advocate for the Respondent Nos. 2 and 3

CORAM : S.R. SATHE,J.
DATED : 03/08/2007

ORAL JUDGEMENT :-

1. The Appellant-original Plaintiff in Regular Civil Suit No.253 of 1979 has preferred this appeal

against the judgement and order passed by the Court of Second Additional District Judge, Nashik in Civil Appeal No.207 of 1986 whereby the order passed by the Court of CJJD, Pimplegaon dismissing the Plaintiff's suit for declaration and injunction was confirmed and the appeal was dismissed. For the sake of convenience hereafter the parties shall be referred to as 'Plaintiff' and 'defendants'.

2. The brief facts giving rise to this appeal are as under :-

The property bearing Gram-panchayat No.322, city survey No.1694 situated at Kasbe-ozar described in detail in paragraph No.1 of the plaint was initially owned by Tatyaji Sakharam Bhatkavle the grand father of original Plaintiffs and defendant Nos. 4 and 5 who are real brothers of each other. In the above mentioned suit property, there is 'Sriram Temple'. On 30/03/1903, Tatyaji Bhatkavle sold the suit property to Dagdu Laxmandas, Kaniram Giridhari, Radhakisan Rajaramsheth Marwadi and Jairam Thaku Teli, the Trustees of Dharma Fund. Thereafter, on 28/05/1903, one registered agreement was executed whereby Tatyaji Sakharam Bhatkavle was appointed as a Poojari for performing pooja and carry out religious day to day functions in

the Ram Temple. After Tatyaji, the said right of performing Pooja was to devolves to his decedents. With a view that the temple should be looked after properly and day to day religious functions are carried out, Tatyaji was also provided a small portion of two khans for his residents in the said temple. Accordingly, Tatyaji started performing his duty by residing in the temple. After the death of Tatyaji, his son Sadashiv i.e. father of the Plaintiffs and defendant nos. 4 and 5 started performing Pooja. He did the duty of Poojari till his death i.e. till the year 1959. However, in the year 1945 and 1947, Plaintiff Nos.2 and 1 respectively started serving in Government Department and as such, they were not residing in the village and performing 'Pooja-archa'. However, according to Plaintiffs, even after the death of Plaintiff's father, at times, they used to reside in the said premises which was according to them was the joint family property of Plaintiffs and defendants. Not only that but occasionally the Plaintiffs also used to perform Pooja in the said temple as of right. The Plaintiffs had never given up the said rights.

3. It is Plaintiff's case that though, no breach of the agreement dated 28/05/1903 has taken place,

taking advantage of the fact that Plaintiffs were not residing at Ozar, the defendant Nos. 1 to 4 in collusion with each other decided that defendant No.4 should surrender his right of worship or right of performing pooja as a Poojari and hand over the accommodation provided in the temple. The defendant Nos. 1 and 2, therefore, filed Regular Civil Suit No.12 of 1975 against defendant Nos. 4 and 6 for permanent injunction and in that suit defendant No.4 entered into a compromise and gave up his rights of performing Pooja and also handed over the possession of the temple alongwith accommodation for residence to defendant Nos. 1 to 3.

4. According to Plaintiff, the defendant No.4 alone had absolutely no right to give up or surrender the hereditary right of performing Pooja. Hence, when Plaintiffs came to know about the above mentioned suit in the year June-1979 they issued notice dated 30/07/1979 to defendant Nos. 1 and 2. However, the defendants gave false reply and denied that the present Plaintiffs were having any existing rights as alleged by them. Hence, Plaintiffs filed suit No.253 of 1979 for declaration that decree passed in regular Civil Suit No.12 of 1975 is illegal and not binding on the

Plaintiffs and for permanent injunction restraining the defendants from obstructing them (plaintiffs) from residing in the suit property and performing day to day Pooja and other religious function in the temple.

5. The defendant Nos. 1 to 3 filed their Written Statement at Exh-20 and admitted that Plaintiffs and defendant Nos. 4 and 5 are grand sons of Late Tatyaji Sakharam Bhatkavle. They, however, contended that suit property was not purchased by them as Trustees but it was purchased in their individual capacity. According to them, they were doing business in partnership and out of the said partnership business they had collected religious fund and out of that they purchased suit property and it was just like a private trust. The defendant Nos. 1 to 3 also admitted the execution of an agreement dated 28/05/1903. They, however, contended that the said right was given only to Tatyaji and there was no hereditary right of worship or performing Pooja given to him. They further contended that some time in the year 1915 or thereabout their partnership was dissolved and the suit property was allotted to the exclusive share of Dagdu Laxmandas and since then, he started using the said property.

6. The defendant Nos. 1 to 3 also admitted that after the death of Tatyaji Sakharam Bhatkavle, his son Sadashiv was performing Pooja in the suit temple and for that he was allowed to reside in some portion of the suit property. However, defendants contended that Plaintiffs were never performing Pooja and they were and are not having any hereditary right of worship or performing Pooja in the suit temple. They also contended that if occasionally Plaintiffs had performed 'Pooja' that would not confer any right on them. They also denied that there was a joint family between Plaintiffs and defendant Nos.4 and 5. According to them, during the lifetime of Sadashiv Plaintiff Nos.1 and 2 were separated and 10-12 years after the death of Sadashiv, defendant Nos.4 and 5 were also separated.

7. The defendant further contended that in the year 1975, defendant No.4 made a complaint that suit property is the Trust Property and for that purpose, he even submitted an application to the Assistant Charity Commissioner. As he started claiming different rights and causing obstruction, the defendant Nos.1 and 2 filed suit against the present defendant No.4 and as the present Plaintiffs were not at all concerned with the suit property, there was no question of joining them in the said suit.

8. Without prejudice to the other contentions the defendant Nos.1 to 3 further contended that even if it is assumed that Plaintiff and defendant Nos. 4 and 5 were having joint family and it was their joint family right to perform Pooja still the defendant No.4 was the Kerta or manager of the said joint family and he was performing Pooja in that capacity he had every right to surrender the right of worship and hence the compromise in suit No.12 of 1975 by which defendant No.4 surrendered the right to perform Pooja to defendant Nos. 1 and 2 is binding on the Plaintiffs. The defendants also contended that the present suit is barred by law of limitation. Hence, on all these grounds the defendant Nos. 1 to 3 prayed for the

dismissal of the suit.

9. The defendant Nos. 4 and 5 filed their Written Statement at Exh-16 and contended that the description of the suit property given in the plaint is not correct. According to them, the suit property was the self acquired property of Tatyaji Sakharam Bhatkavle and he sold the said property in the year 1903. At that time, purchasers appointed Tatyaji Sakharam Bhatkavle as Poojari and gave right to perform Pooja in the suit temple. They also contended that no right was created in favour of joint family. In fact, it was their contention that there was no joint family of Plaintiff and defendant Nos. 4 and 5 and during the life time of their father Sadashiv, Plaintiff Nos. 1 and 2 were separated. Defendant Nos.4 and 5 also contended that there was no immovable property of the alleged joint family. Movable property of the joint family namely utensils etc. were already distributed amongst the Plaintiff and defendants. They also contended that only in exceptional circumstances i.e. non-availability of defendant No.4, at times the defendant No.5 performed Pooja but that was not as of right. According to them, Plaintiffs were not at all concerned with the right of worship. They were not made parties to Regular Civil

Suit No.12 of 1975 and the right of worship given to the defendant No.4 was his exclusive right and he voluntarily surrendered the same while entering into compromise in Regular Civil Suit No.12 of 1975. Hence, on all these grounds, the defendants prayed for the dismissal of the suit.

10. On these pleadings, the learned Trial Judge framed issues. Both the parties adduced oral and documentary evidence. After considering the said evidence, the learned Trial Judge came to the conclusion that there was no joint family between Plaintiffs and defendants when suit No.12 of 1975 was filed and Plaintiffs have not inherited right of performing Pooja in the suit temple. According to him, Plaintiffs failed to prove that the suit No.12 of 1975 was filed by the defendant Nos. 1 to 4 in collusion with each other and the defendant No.4 had every right to surrender the right of performing Pooja. He, therefore, dismissed Plaintiff's suit.

11. Being aggrieved by the said order the Plaintiff filed Civil Appeal No.207 of 1986 but the same also came to be dismissed. Hence, Plaintiff filed the present Second Appeal.

12. While admitting the appeal this Court (CORAM : H.H. Kantharia, J.) has passed the following order :-

> *" The substantial question of law is set out at point No.1.*
>
> *Admit."*

The said point No.1 runs as under :-

> **(1)** Whether Respondent No.4 alone had the right to surrender the right to reside in the temple and worship god under the agreement (Exh-52) dated 28th May, 1903.

13. In this appeal before me, Shri Gokhale, learned Advocate for the Appellant has urged only two points. Firstly, he submitted that the learned Trial Judge has not properly appreciated the evidence and has wrongly held that partition had taken place between Plaintiff and his real brothers i.e. defendant Nos. 4 and 5. Secondly, he canvassed before me that the Court below ought to have considered agreement under which Plaintiff's grand father was appointed as hereditary Poojari and should have held that defendant No.4 alone had no right to surrender the right of performing Pooja. He, therefore, submitted that the appeal be allowed and decree as prayed by the Plaintiff be passed. As against this, Shri Haridas, learned Advocate

for the Respondent Nos.2 and 3 supported the judgement and order passed by the learned Additional District Judge. He also submitted that Plaintiff had in fact no right to file such suit in view of the provisions of section-9 of the Civil Procedure Code. He, therefore, submitted that the appeal be dismissed.

14. It is not in dispute that the suit property was initially owned by the grand father of the Plaintiff and defendant Nos. 4 and 5 namely, Tatyaji Sakharam Bhatkavle and he sold the same to Dagdu Laxmandas, Kaniram Giridhari, Radhakisan Rajaramsheth Marwadi and Jairam Thaku Teli, the Trustees of Dharma Fund on 30/03/1903. Admittedly, even at that time, there was Sri Ram temple in the suit property and plaintiff's grand father was performing pooja and other religious functions in the said temple. Even after the time property was purchased by above named four persons, the Plaintiff's grand father Tatyaji Sakharam Bhatkavle was appointed as Poojari for performing Pooja and other religious functions in the temple by the purchasers and accordingly, registered agreement was executed. As the fate of this appeal depends on the contents of the said agreement, it would be worthwhile to reproduce the relevant contents of the said agreement which is at

Exh-52.

It is mentioned in the said agreement :-

"त्या मंदीरातील मूर्तीचे पूजेकरीता माझी नेमणूक केलेली आहे. य
ास्तव धर्म शास्त्राप्रमाणे व वहीवाटीचे रीतीने व नियमाने पूजाअर्चा ध
ूपदिपारती वैगरे नित्य नैमितीक गावातील चार सभ्य लोकांस पटेल
असे रीतीने काळजीपूर्वक व व्यवस्थशीर करीत जाईन व बाजूचे दोन
खणात रहात जाईन. ही नेमणूक वंशपरंपरेची मजकडून किंवा माझे
वंशजाकडून किंवा हक्कदाराकडून सदरी लिहील्या व्यवस्था न
राहिल्यास मंदीराची आणि त्यातील हल्ली असलेले व पूढे दिलेल्या
सामानाची व्यवस्था न राहिल्यास अगर अपरातपर झाल्यास तुम्हास व
गावातील आपले धर्माचे संभावीत लोकांस पटेल अशी व्यवस्था
लावण्यास तुम्ही मुखत्यार आहात. मी कोणतेही प्रकाराने किंवा सबब
न दाखविता मंदीर बखळ जागे वैगरे खाली करुन देईन व तुम्ही
पाहीजे तो पुजारी ठेवून मंदीराची व देवाचे पूजेची व्यवस्था ठेवावी.
मंदीराची व्यवस्था नीट सुरळीत राहील तर ही नेमणूक वर
लिहील्याप्रमाणे वंशपरंपरा ठरलेली आहे. माझया किंवा माझया
वंशजांच्या हलगर्जीपणामूळे मला किंवा त्यास काढून टाकल्यास मी
कोणतेही त-हेचा हक्क न सांगता जाईन. मला काढून टाकल्यावर
माझे किंवा माझे वारसांचा ..... "

15. From the pleadings of the parties and the evidence it is very clear that it is not even disputed by the defendants that such agreement had taken place. It is worth to note that even in the suit bearing No.12 of 1975 filed by the present defendant No.1 against the present defendant Nos. 4 and 5 and others, the present defendant No.1 had clearly admitted the above mentioned agreement Exh-52. So, it is first necessary to see as to what were the terms and conditions on which the grand father of Plaintiff and defendant Nos.4 and 5 was appointed as Poojari.

16. From the contents of the agreement Exh-52, it is very clear that Tatyaji Sakharam Bhatkavle was given hereditary right to perform Pooja. It is also clear that no remuneration was to be paid for performing Pooja. It was made clear that the appointment of Poojari will continue or will devolve on the heirs of Tatyaji and as he was supposed to look after and perform pooja, small portion of two khans was provided to him for his residence. It is an admitted fact that during the life time of Tatyaji Sakharam Bhatkavle, he used to perform Pooja in the temple in question and after his death, his son Sadashiv i.e. father of present Plaintiffs and defendant Nos. 4 and 5 continued

to reside in the said two khans portion and perform Pooja. It has come on record that during the time when Plaintiffs were minors they were in fact residing with Sadashiv in the premises mentioned above. However, the Plaintiff Nos. 1 and 2 got government service and as such, they were required to move to different places from the year 1947 and 1945 respectively. It is not in dispute that Sadashiv died some time in the year 1959 and after his death, the defendant No.4 who happened to be eldest brother of Plaintiff and defendant No.3 started performing Pooja of Sri Ram deity and residing in the said two khans portion. Admittedly, at times Plaintiffs also used to perform Pooja whenever they used to visit the temple. It is also an admitted fact that the family of Plaintiffs and defendants had no any immovable property. It is the contention of the defendant Nos. 4 and 5 that partition of their movable property namely utensils etc. had taken place after the death of Sadashiv but to substantiate the said version, there is absolutely no evidence worth the name. So, there is nothing on record to indicate that the partition has actually taken place between Plaintiff and defendant Nos.4 and 5.

17. A feeble attempt has been made on behalf of

defendant Nos. 4 and 5 to show that even if it is assumed that there was joint family of Plaintiffs and defendants then the defendant No.4 was 'Karta' of the said family and in his capacity as 'Karta', he surrendered right or his appointment and as such, the same is binding on the Plaintiffs. Firstly, it must be noted that by virtue of the agreement Exh-52, Tatyaji Sakharam Bhatkavle was appointed as Poojari and it was agreed that further appointment of Poojari will be made on the basis of hereditary rights. It is well settled that religious offices can be hereditary and that the right to such an office is in the nature of property under the Hindu Law. It has been so held in the **Monohar V/s. Bhupendra AIR 1932 Calcutta 791 and Ganesh Chunder V/s. Lal Behary AIR 1936 Privy Council 318**. By very nature and all the terms and conditions of the agreement Exh-52, it is very clear that Poojariship right was devolved on the heirs of Sadashiv. So, Plaintiffs and defendant Nos. 4 and 5 had in fact equal right of performing Pooja. It is needless to say that when such hereditary appointment of Poojari is made then Pooja can be performed by any one of the heirs. There is no rule of law which says that the said Pooja can be performed only by the eldest son. Admittedly, even in the instant agreement Exh-52, there is no such

stipulation. So, it was only a matter of convenience or at the most a matter of mutual agreement between heirs that one of the heir may be doing Pooja. But that does not mean that those who are not actually performing Pooja have surrendered their rights. In fact, that is why many times when it is convenient to all the heirs to perform Pooja then we find that amongst them they fix the period when each one of them would perform Pooja. In the instant case, Plaintiffs were out of town and as defendant No.4 was residing at the place where the temple is situated he was performing Pooja. It has come on record that at times Plaintiff had also performed Pooja. So, I have no hesitation to hold that though Plaintiffs were residing out of the town in which temple is situated, that does not mean that they were not ready to perform Pooja or that they had no intention for continuing the appointment as Poojari.

18. From the perusal of the judgement of the Trial Court as well as learned Additional District Judge it appears that both of them have relied on a ruling reported at **AIR 1977 SUPREME COURT 1694**. I have carefully gone through the said authority. The facts of the said case and the facts of the case in hand are quite different. In that case, the point was whether

income derived from profession as hereditary trust can be said to be a joint family property. In the instant case, no such issue is at all involved. Admittedly, there was no remuneration for performing pooja nor there are pleadings and evidence with regard to taking any income from performing Pooja. So, the above cited ruling is of no help to the present defendant Nos. 4 and 5.

19. Shri Haridas, learned Advocate for Respondent Nos.2 & 3 tried to argue that the present suit is barred by section-9 of CPC. For this proposition, he has drawn my attention to a case **Sri Sinha Ramanuja Jeer V/s. Sri Ranga Ramanuja Jeer AIR 1961 Supreme Court 1720.** However, the facts of the said case and facts of the present case are different. In that case, question was regarding religious rights and ceremonies of the parties. Here in the instant case, Plaintiffs are claiming a right to perform pooja on the basis of specific agreement i.e. Exh-52 where it is clearly mentioned that Poojariship will devolve on the heirs. It is hereditary appointment. In fact, this very ruling clearly says that when the suit is for an office of poojariship, it is of a civil nature and there would not be bar of section-9 of CPC. So, the above cited ruling is of no use to the present defendants.

20. It is an admitted fact that in the year 1975 defendant No.4 made an application to the Charity Commissioner that the temple in question is a public temple. However, his contention in that behalf was rejected. It is at that time, the owners of the temple filed suit simplicitor for permanent injunction restraining defendant Nos.4 and 5 from not doing any

act which will affect the right, title of the owners of the said property. Admittedly, the said suit was opposed by present defendant Nos.4 and 5 but ultimately, it was compromised and the present defendant No.4 surrendered his rights of performing Pooja and residing in the two khans portion of the temple. Question arises whether he had legal right to give up the said Poojariship which was admittedly, hereditary one and in which the other brothers were having equal rights. It is an admitted fact that at that time, Plaintiffs were major. Their consent was not obtained for surrender. It is in fact not established that defendant No.4 was performing Pooja for and on behalf of other brothers. So, in my opinion, when defendant No.4 had no intention to continue his appointment as Poojari and when the owners namely present defendant Nos.1 to 3 had not at all alleged that the conduct of defendant No.4 was not as per the discipline and as such they wanted to remove him from the post of Poojari, it can not be said that the right in question had come to an end. Had it been a case where defendant Nos.1 to 3 had asked the defendant No.4 to stop performing 'Pooja' on account of his any misbehaviour, it would have been different thing because then in that event it could have been said that

very right to perform Pooja created by virtue of agreement Exh-52 was cancelled. As, such cancellation was expressly permitted in the agreement due weightage shall have to be given to the fact that it is not the contention of the defendant Nos. 1 to 3 that the appointment of Poojari has come to an end as a result of miss-behavior of any of the heirs of Poojari or of defendant No.4. So, under such circumstances, I am of the considered view that the defendant No.4 and 5 have in fact no right to surrender the right of Poojari or right of worship in the Sri Ram temple as a Poojari and as such, the compromise decree entered into between present defendant No.1 and defendant Nos. 4 and 5 in the earlier suit No.12 of 1975 is not binding on the present Plaintiff.

21. As the defendant Nos.4 and 5 had no right to surrender, it is necessary to declare that the compromise decree passed in regular civil suit No.12/1975 at least to the extent of surrendering right of performing Pooja is not legal and valid. Hence, the said compromise is not binding on the present Plaintiff and that compromise can not put to an end the Plaintiffs' right to perform Pooja which they have inherited from their father. From the perusal of the

record it is very clear that at present new construction has been carried out in the said property and presently, there is no residential accommodation in the said temple. So, considering the peculiar circumstances, I am not inclined to grant discretionary relief of injunction in respect of the residential premises but the defendants can be restrained from obstructing Plaintiffs from performing Pooja as Poojari in the said temple as their hereditary right of performing Pooja as Poojari in the said temple has not been legally put to an end by the defendants. Hence, I pass the following order :-

O R D E R

The appeal is partly allowed.

It is hereby declared that decree passed in Regular Civil Suit No.12 of 1975 by the Court of Civil Judge Senior Division, Pimplegaon in respect of surrendering the right to worship and perform Pooja as Poojari in the suit temple is not binding on present Plaintiffs.

The defendant Nos. 1 to 5 are permanently restrained from obstructing the Plaintiffs from performing Pooja and carrying out other religious

functions contemplated under the agreement Exh-52 dated 28/05/1903 in the suit temple.

Under the circumstances of the case, parties to bear their own costs of this appeal.

(S.R. SATHE, J.)